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No. 247

In the

Supreme Court of the United States

October Term, 1963

SETRAK K. BOYAJIAN, individually
and doing business as
PRECISION TESTING LABORATORIES,
Petitioner,

v.

OLD COLONY ENVELOPE CO., INC.
and STEIN HALL & CO., INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

REPLY BRIEF FOR PETITIONER

SETRAK K. BOYAJIAN,
Petitioner.
P. O. Box 973
Worcester, Massachusetts, 01601.

March 25, 1964

HENDRICK PRINTING CO., WESTWOOD, MASS.

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REPORT OF OPINIONS BELOW

At the time of writing the petition in this case, indices for the volumes of federal reporters containing the opinions below were not available, and your petitioner was not aware

if such opinions were reported and he so stated in his petition (Page 2). Now it is known to him that the Per Curiam opinion of the Court of Appeals (Appendix B to petition) is reported in 323 F.2d 871, and that the memorandum opinions of the District Court (R. 79-82, 84-86) are reported in 223 F.Supp. beginning at page 995.

ERRATUM IN THE PETITION

The typographical error in the spelling of "certiorari" as it appears in the title on the cover and on page 1 of the petition was not discovered until after it was filed.

REPRESENTATIONS IN RESPONDENTS' BRIEF

Your petitioner is aware of the fact that the proper function of a reply brief is not to correct inconsequential errors of fact and law in respondents' brief, but to rebut material contradictions therein which may properly read upon material allegations in the petition. There are no such contradictions in respondents' brief, which is chiefly or largely made of loose-end innuendos leading to nowhere in this case, and even if all the statements were assumed, arguendo, to be true statements (notwithstanding the fact that they are fully refuted by the record) they would still be inconsequential by way of any adverse effect to the granting of certiorari, or even a summary reversal.

Respondents refer to your petitioner's appearing "pro se" as if it were a capital crime on his part, and a reading of the District Court's memorandum of February 13, 1963 [illegible] suggests that the District Court was inclined to agree with them.

Respondents' effort to disparage the patent in suit by referring to it as being "ordinary" and not "unusual" does not afford them relief on any point in issue. Nor such characterization is in any way supported by the record (see petition 12-20, and references therein). Upon reading such record, one wonders how much more extra-ordinary and unusual can a patent get?

Other representations in respondents' brief are on the same level and tenor, and are either fully erroneous or lead to nowhere.

THE CHALLENGE TO THIS COURT TO REMEDY THE LONG-STANDING ILLS IN THE COURTS BELOW IN PATENT LITIGATIONS.

It has often been said that a patent serves as an equalizing factor between a small businessman and a large corporation in the line of competition by reason of the protection it affords him. To be sure, in both law and principle patents are intended to protect the inventor. In effect they do the opposite. The inventor must always protect his patent which is only as good as his financial ability to protect it. Someone has in humor characterized this as "the proverbial tail wagging the dog".

A patent has been classified by a long line of decisions (see also 35 U.S.C. 261) to be as much a property as any other possession a person may own; but no one in the know needs any argument to be shown that it is the most hazardous property that can be owned. One may walk in any of our city streets with a bundle of currency in his hand with a greater sense of security than with a patent locked in his

safe, issued to him under the Great Seal of the United States Government, under the Act of Congress by the authority of the Constitution and after many years of mental and physical labor in reducing the invention to practice, and many more years of exhaustive litigation in the Patent Office. The question of basic honesty or dishonesty in the willful infringement of another's patent does not seem to enter into the picture at all. As someone has stated during a recent Senate hearing on patents, a man, who on finding another's lost pocket book containing large sums of money will do his utmost to find its rightful owner and return it to him, will not hesitate willfully to infringe the patent of an inventor who financially is not his match in a court litigation.

Such willful infringers have always corps of legal crews at their elbows, ready and willing to undertake the work of defeating ~~any worth while patent~~ provided that it is held by an individual of limited means. Their aggressiveness has been mistaken by some trial courts for sincerity; and since the individual inventor is unable to match the legal talent of the infringer, his chances of survival are very small regardless of how strong his patent may be. It is all a matter of a strong patent being in weak hands, and thus a fair game for willful infringers, following Kipling's law of the jungle. Such a law may be just the thing for the jungle, but in our advanced human society it can only serve to promote the survival of the unfittest, amounting to the proverbial killing of the goose with the golden eggs.

Once former Congressman Lanham of Texas said: "The important thing is to preserve and promote the incentive of the individual inventor, the small man in particular, be

cause it is this incentive which has led to inventions that has made our country preeminent industrially and otherwise among nations of the world. That incentive must not be impaired."

Former Senator O'Mahoney has said: "We have a government which was founded upon the theory that the individual comes first. The Constitution was written for the benefit of the people as individuals. Because of the complexity of the modern world, forces have developed at a very rapid rate. It makes no difference whether they are corporate organizations, managed by employees or Government organizations managed by Government employees. The great issue of our time is how to protect the individual citizen from the activity of the organizations which limit the field in which the individual may act."

This Court stated in U.S. v. Dubilier Condenser Corporation (289 U.S. 178): "An inventor deprives the public of nothing it enjoyed before his discovery and gives something of value to the community by adding to the sum of human knowledge."

The late President Roosevelt said: "Patents are the keys to our technology; technology is the key to production; production is the key to victory."

The District Court has in this case completely ignored (deficit is perhaps the better word) all these and many similar statements of principle in denying to the defendant even as much as a trial simply because he is a small inventor who has dared to defend, single handed, his property right in the patent in suit against a combination of corporate forces equipped with a corps of legal geniuses. This fundamental

other reason that may be assigned to explain the District Court's action in granting plaintiffs' motion for summary judgment support the fact that a decision without deliberation upon pertinent law and fact, and clearly erroneous as to both, has been made. The District Court has done so without any concern over the injustice of it all. Not since the days before the Magna Carta, your petitioner respectfully submits, a court of justice in an English speaking country has handed down so shockingly wrong and unjust a decision as the one in this case. Can it be that our judicial system has relapsed into that which existed in England seven and a half centuries ago?

Such apprehension appears fully justified when one reads the memorandum decisions of the District Court (R. 79-82, 84-86) and the Court of Appeal's blanket sanction thereof (Appendix B to Petition), unless this Court will exercise its power of review by certiorari.

Here is a case involving a basic invention which has revolutionized the industry, and has taken a third of a lifetime to reduce to practice, wherein the District Court has decided, without a trial, fact issues, not only as relate to the legal aspects of the case but has also decided, still without a trial, questions purely in the nature of science and technology, substituting his own views, placing himself in the self-qualifying roll of a scientist, for those of the inventor and the authorities cited by him. Can this Court afford to let such a decision stand?

While your petitioner is alone in the particular case, its outcome will affect scores of thousands other individual inventors who are facing the same problems. If such a decision is permitted to stand, invention, such as contemplated

by the Constitution and Congress, will eventually become extinct, and the last nail to the coffin of "flash of genius" will be driven home, leaving the destiny of our nation's future progress in the hands of "organized research", which is sometimes characterized as "synthetic invention" to distinguish it from "natural" or individual invention. The first involves "skill in the art", the second "inventive talent". Both are necessary for progress.

CONCLUSION

For the further reasons above stated, the writ of certiorari prayed for in the petition ought to be granted.

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